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No. 09-951

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,

Petitioner,

v.

UNITE (Union of Needletrades, Industrial & Textile Employees),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the "pursuant to a court order" provision of Section 2721(b)(4) of the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-25 (1994) (the "DPPA"), give a court authority to allow access to DPPA-protected motor vehicle information even though there has been no showing that the information will be used for one of the fourteen permitted uses enumerated in the DPPA?

CORPORATE DISCLOSURE STATEMENT

The respondent states that it has no parent corporation and that no publicly held corporation holds its stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent UNITE (Union of Needletrades, Industrial & Textile Employees (AFL-CIO))[1] respectfully requests that this Court deny the petition for a writ of certiorari.

ADDITIONAL RELEVANT PROVISIONS OF THE STATUTE INVOLVED

At issue in this petition is the "Permissible Uses" section of the Driver's Privacy Protection Act, 18 U.S.C. § 2721(b), which is produced in full below.

18 U.S.C.A. § 2721. **Prohibition on release and use of certain personal information from State motor vehicle records**

> **(b) Permissible uses.**—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non owner records from the original owner records of motor vehicle manufacturers to

[1] Since this action was commenced, UNITE merged with another labor organization and its official name is now "UNITE HERE." "UNITE" will be used throughout this petition to refer to the labor organization now known as UNITE HERE.

carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. § 1231 et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

STATEMENT OF THE CASE[2]

National Right to Work ("NRTW"), an avowedly anti-union organization, has filed this petition from the Third Circuit's decision affirming the District Court's holding that NRTW had no standing to obtain access to information exchanged in discovery and subject to a protective order in litigation against UNITE to which NRTW is not a party. The Third Circuit specifically held that NRTW lacked standing because the requested information was motor vehicle records information protected by the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 ("DPPA"); and NRTW had not demonstrated that its intended use of the information came within one of the fourteen permitted uses enumerated in the DPPA.

A. THE *PICHLER v. UNITE* LITIGATION

In June 2004, a group of plaintiffs brought a putative class action against Respondent UNITE on behalf of employees of Cintas Corporation ("Cintas"). *See Pichler v. UNITE*, No. 04-2841 (E.D. Pa. 2004). The plaintiffs alleged that in its campaign to provide Cintas employees with information about unionizing and Cintas's violation of their employee rights, UNITE violated the DPPA by obtaining and using motor vehicle record information to contact Cintas employees. Soon after the litigation began, the District Court granted in part UNITE's motion for a protective order (the "Protective Order")

[2] References to "Pet.App." are to the Appendices to NRTW's Petition. References to "JA" are to the Joint Appendix filed in the Third Circuit.

to shield "potential evidence as confidential if that potential evidence directly relates to defendants' labor union organizing or mobilization strategies." (*Pichler* Protective Order of 1/10/05 (JA 29).)

UNITE defended the litigation on the grounds, *inter alia*, that because it used the Cintas employees' motor vehicle record information to investigate potential legal violations by Cintas, its use of the motor vehicle information was permitted pursuant to 18 U.S.C. § 2721(b)(4) which provides that personal information from motor vehicle records may be disclosed "[f]or use in connection with any civil . . . proceeding . . . including . . . investigation in anticipation of litigation." The District Court rejected this argument, granting summary judgment to the named representative plaintiffs on August 30, 2006, and finding that UNITE's actions did not fall within the litigation exception because

> [t]he DPPA . . . does not permit one to acquire and use statutorily proscribed personal information to solicit or find claims. That is all that UNITE's actions amounted to here, and such claim trolling is far short of the concreteness Congress had in mind to remove the DPPA's protection. UNITE therefore cannot take refuge in the litigation exception.

Pichler v. UNITE, 446 F. Supp. 2d 353, 370 (E.D. Pa. 2006). The District Court's finding that UNITE was liable to the plaintiff Cintas employees for violating the DPPA was upheld by the Third Circuit on appeal. *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1662 (2009).

B. THE WEST RECORDS

The extensive discovery in the *Pichler* action included plaintiffs' subpoenas *duces tecum* and *ad testificandum* to Thomson West ("West"), the company which operates Westlaw, for all the records of UNITE's motor vehicle searches on Westlaw during the period from July 1, 2002, through October 13, 2004, whether they were related to the Cintas campaign at issue in *Pichler* or not. (Pet.App. 7a.) Because West was unable to produce the results of the Westlaw motor vehicle searches that were conducted by UNITE, it produced a re-creation of these searches by running in the database as it existed in 2005 the searches previously performed by UNITE (the "West Records"). (Supplement to Joint Stipulation of Facts for Parties' Cross-Motions for Summary Judgment (JA 123-128).) For example, if UNITE had searched the Michigan motor vehicle database for license plate "ABC123" in October 2002, Westlaw would run a search in the Michigan motor vehicle database in 2005 for license plate "ABC123" and include the results in the West Records. The West representative testified that there was no way to determine whether any of the names on the West Records were actually obtained by UNITE:

> Q Well, how are you able to assure us that the information in the recreation is the same information that was given to users of the database when they made the original inquiry sometimes [sic] a couple of years before?

A. I cannot.

Q. Is there any way for Westlaw to determine not what a recreation of the database shows but what was actually provided to the users of the database at the time the original inquiries were made?

A. Not to my knowledge.

(Dep. of Kevin Appold (JA 85).)

The West Records were designated by UNITE as confidential pursuant to the Protective Order both because the records contained DPPA-protected personal information of individuals whose motor vehicle records were searched by West in responding to the subpoena and because the West Records identified groups of individuals who may have worked for employers other than Cintas that UNITE was considering as potential targets for organizing. (Pet. App. 33a.) Disclosure of the names in these records, which may include members of management, would disclose to employers the previously unknown fact that their companies had been surveyed as a potential organizing target by UNITE. The West Records were never filed with the District Court and did not become part of the judicial record. (Pet.App. 7a.)

C. NRTW'S INTERVENTION AND MOTION TO MODIFY THE PROTECTIVE ORDER

While the *Pichler v. UNITE* appeal from the entry of summary judgment in favor of the named plaintiffs for the Cintas class was pending in the Third Circuit, counsel for NRTW contacted class counsel in *Pichler* requesting that they provide NRTW with the West Records so that NRTW might contact each identified individual listed who was not an employee of Cintas and hence was not a member of the certified class in *Pichler*. (Letter of William L. Messenger, Esq., dated July 30, 2007 (JA 111-113).) NRTW sought to advise these individuals that UNITE had allegedly obtained their motor vehicle information in violation of the DPPA. (*Id.*) In response to this request, class counsel responded: "We and our clients have no objection to providing you with this information, at your expense, *provided* that we are assured that doing so will not violate any obligations we may have to maintain the confidentiality of that information, whether pursuant to the Court's protective order or under the DPPA." (Letter of David B. Picker, Esq., dated August 6, 2007 (emphasis in original) (JA 115).)

NRTW subsequently moved to intervene in the *Pichler* action, seeking to modify the Protective Order to allow it to obtain access to the West Records in order to send a letter to each individual whose name and address is contained in those records, other than the members of the *Pichler* class, notifying them that UNITE may have violated the DPPA by obtaining their personal information. (Pet.App. 9a.) In effect, the motion sought the District Court's permission to send a notice

about evidence in the *Pichler* class action to persons not members of that class. Indeed, NRTW's proposed letter stated that NRTW "obtained permission from the *Pichler* Court to send a letter to each individual whose motor vehicle records were searched by UNITE, and who is not a Cintas employee, that this action occurred." (Proposed Order Granting Motion to Modify Protective Order (JA 118).) The proposed letter, after identifying NRTW as a "non-profit legal-aid organization" and advising recipients to "contact an attorney" about whether UNITE had violated their rights, also included the solicitation to these individuals that "[i]f you wish, you can contact [NRTW] to learn about your rights and options under the Driver's Privacy Protection Act." (JA 118-19.)

On February 7, 2008, the District Court granted NRTW's Motion to Intervene but denied its Motion to Modify the Protective Order, finding that the records sought were "raw discovery" not available to the public. (Pet.App. 36a-37a.) After NRTW filed a motion for reconsideration, the District Court again denied NRTW's Motion to Modify, finding that NRTW lacked standing to seek the documents in question because it had no path of access to the documents. (Pet.App. 28a.) In the alternative, the District Court held that even if NRTW had standing, it was not entitled to a modification of the Protective Order pursuant to the factors set forth in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the case governing courts' protection of proprietary business or other confidential information in the Third Circuit. (Pet.App. 28a-31a.)

NRTW appealed this denial to the Third Circuit, which unanimously affirmed the District Court's ruling that NRTW lacked standing to modify the protective order. (Pet.App. 1a-26a.) The Third Circuit held that NRTW lacked standing to modify the Protective Order because "third parties have standing to challenge a gag order only when there is reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so." (Pet.App. 19a, *quoting FOCUS v. Allegheny County Court of Common Pleas*, 75 F3d 834, 838-39 (3d Cir. 1996).) *Pichler* class counsel was not willing to provide the West Records but for the protective order; they also required assurance that they would not violate the DPPA by providing motor vehicle records to NRTW. Therefore, to determine whether NRTW had standing to modify the protective order, the Third Circuit analyzed whether the DPPA permitted NRTW to access the motor vehicle records.

The obtainment or disclosure of "personal information from a motor vehicle record" is a violation of the DPPA unless one of fourteen specified exceptions applies. 18 U.S.C. §§ 2721, 2722. NRTW contended that its request was permitted by 18 U.S.C. § 2721(b)(4) (the "Litigation Exception"), which provides that personal information from motor vehicle records may be disclosed:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or

> enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

NRTW argued to the Third Circuit that its request for the West Records was permitted pursuant to the Litigation Exception for three reasons: (1) the West Records would be used "pursuant to an order of a Federal . . . court"; (2) the West Records would be used "in connection with [a] civil . . . proceeding in any Federal . . . court"; and (3) the West Records would be used pursuant to an "investigation in anticipation of litigation." (Pet.App. 22a.)

The Third Circuit found NRTW's request did not come within the Litigation Exception for the same reason that UNITE's use of motor vehicle record information to advise Cintas employees about the company's violations of their rights did not come within the Litigation Exception in the underlying litigation. In *Pichler v. UNITE*, the District Court had found that UNITE did not come within the Litigation Exception when it sought to use motor vehicle record information to investigate and bring claims against Cintas because "the litigation exception of the DPPA requires something more than merely using the protected records to identify potential litigants." (Pet.App. 23a.) The Third Circuit found that "UNITE's use of the information . . . was impermissible because it amounted to nothing more than discovery of potential plaintiffs. We see no distinction between UNITE's impermissible purpose, and the purpose for which the NRTW is seeking the information." (Pet.App. 24a-25a.) The Third Circuit therefore held that NRTW lacked standing to modify

the Protective Order because *Pichler* class counsel was not a willing speaker when providing the West Records to NRTW would violate the DPPA.

Because NRTW lacked standing, the Third Circuit did not reach the District Court's alternate holding that NRTW was not entitled to a modification of the Protective Order on the merits. (Pet.App. 15a.)

REASONS FOR DENYING THE PETITION

NRTW requests that this Court grant its petition for a writ of certiorari not because of any alleged conflict between the Third Circuit's decision and the decision of any other court, but merely because it disagrees with the Third Circuit's decision. The Third Circuit held that an entity which cannot demonstrate a right of access to confidential motor vehicle information under any of the fourteen permissible uses set forth in the DPPA is not entitled to such information simply because it requests a court order providing access to such documents. This holding is not in conflict with any other Circuit; indeed, it is in accord with the decisions of those courts which have been asked to authorize access to DPPA-protected motor vehicle records. Moreover, because the Third Circuit held that NRTW lacked standing to modify the Protective Order, it did not consider NRTW's contention that the District Court abused its discretion in declining to modify the Protective Order. Because a reversal of the Third Circuit's decision would not provide NRTW with access to the information it seeks, this petition is not an appropriate vehicle for this Court to undertake an explication of the Litigation Exception to the DPPA.

A. THE THIRD CIRCUIT CORRECTLY HELD THAT NRTW'S REQUEST FOR MOTOR VEHICLE RECORD INFORMATION DID NOT COME WITHIN THE DPPA'S LITIGATION EXCEPTION

The Court should deny NRTW's petition because the Third Circuit's opinion was not only correct and in accordance with every other case interpreting the DPPA, but also because NRTW's proposed interpretation would completely undermine the DPPA.

NRTW argued to the Third Circuit that its request for the West Records was permissible pursuant to the Litigation Exception for three reasons: (1) the West Records would be used "pursuant to an order of a Federal . . . court"; (2) the West Records would be used "in connection with any civil . . . proceeding in any Federal . . . court"; and (3) the West Records would be used pursuant to an "investigation in anticipation of litigation." (Pet.App. 22a.) NRTW now advances only the first of these arguments – that its request is permissible pursuant to the DPPA because its use would be pursuant to a court order. (Pet. at 8-10.) Therefore, NRTW's other two arguments made to the Third Circuit about why its actions were permissible pursuant to the DPPA are waived.[8] *See Bay Area Laundry and Dry*

[8] These two waived arguments are without merit. As the Third Circuit correctly noted, NRTW's request was not in connection with any civil proceeding because "NRTW is seeking information about people who are not even members of the *Pichler* class." (Pet.App. 26a.) In addition, courts have consistently held that attempts to find clients for a lawsuit do

(Cont'd)

Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 206–208 (1997) (finding that a statutory interpretation argument made in the Court of Appeals was waived by petitioner's failure to include it in the petition for certiorari); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (declining to consider argument withheld from the petition for certiorari and made for the first time in briefing on the merits).

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NRTW's sole argument – that it is entitled to a court order allowing it access to the West Records because it is seeking a court order requesting access to the West Records – is circular reasoning and does not warrant consideration by this Court. Tellingly, NRTW does not cite even a single authority in support of its position that it is entitled to the West Records merely because NRTW requested them "pursuant to an order of . . .

(Cont'd)

not fall within the "in anticipation of litigation" clause of the Litigation Exception. For example, in *Pichler v. UNITE*, the District Court found that UNITE's contacting Cintas employees was not "in anticipation of litigation" because

> [t]he DPPA . . . does not permit one 'to acquire and use statutorily proscribed personal information to solicit or find claims. That is all that UNITE's actions amounted to here, and such claim trolling is far short of the concreteness Congress had in mind to remove the DPPA's protection. UNITE therefore cannot take refuge in the litigation exception.

446 F. Supp. 2d at 370; *see also Wemhoff v. District of Columbia*, 887 A.2d 1004, 1012 (D.C. 2005) ("acquiring personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b).").

court." If accepted, NRTW's position would allow the final clause of Section 2721(b)(4) to eviscerate the fourteen enumerated permitted uses of motor vehicle information. If the simple act of *requesting* a court order without demonstrating that the individual would use the motor vehicle records for one of the fourteen permitted uses provided by the DPPA were sufficient for the Court to *issue* the order, this would make the fourteen explicit exceptions superfluous – an interpretation inconsistent with this Court's canons of statutory interpretation. *See, e.g., BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("the preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there.") (citation omitted). Because a court is not free to disregard the fourteen permitted uses enumerated in the DPPA, NRTW's argument that the court may issue an order for the use of motor vehicle information for any purpose is without merit.

NRTW's position that the "pursuant to an order of . . . court" language should be interpreted as a separate exception to the DPPA additionally fails because the provision allowing for the production of motor vehicle records "pursuant to an order of . . . court" can only be read in the context of the Litigation Exception as a whole. The Litigation Exception provides that motor vehicle information may be obtained or disclosed "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body" and then includes as examples: "investigation in anticipation of litigation," "the execution or enforcement of

judgments and orders," and "pursuant to an order of a Federal, State, or local court." 18 U.S.C. § 2721(b)(4). The doctrine of *ejusdem generis* requires that this final clause be interpreted in the context of the Litigation Exception as a whole which makes clear that a court order would be in connection with and in furtherance of an ongoing legal action (or an "investigation in anticipation of litigation," but NRTW does not argue that this clause is applicable). NRTW's attempt to interpret the "pursuant to an order of a Federal . . . court" clause as a stand-alone exception disregards the rest of the Litigation Exception and therefore violates the principles of statutory construction. *United States v. Morton*, 467 U.S. 822, 828 (1984) ("[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.")

NRTW's claim that the Third Circuit's interpretation makes the DPPA "self-defeating" is belied by NRTW's failure to attempt any sort of investigation into the alleged violations. The hypothetical DPPA whistle-blower alluded to in NRTW's Petition could, without violating the DPPA, report that he was aware that an entity was obtaining motor vehicle records in violation of the DPPA. The person who receives the whistle-blower's report of the DPPA violation – whether it is a law firm, an attorney general, or the company whose employees motor vehicle information is being searched – could then investigate the allegations, file a lawsuit, and obtain discovery of the motor vehicle records at issue. Indeed, this example demonstrates the major fallacy in NRTW's contention that the Third Circuit's interpretation of the DPPA is self-defeating. Had NRTW undertaken an investigation

and filed a lawsuit on behalf of an individual who had been located and contacted by UNITE using motor vehicle information, as the *Pichler* plaintiffs did (without the benefit of receiving the West Records beforehand), NRTW would have come within the Litigation Exception. Instead, NRTW, which does not contend that it has suffered any injury as a result of UNITE's alleged violations of the DPPA, seeks to bypass the normal pre-litigation investigation process. Rather, in connection with its efforts to provide free representation to employees who have suffered violations of their rights as a result of compulsory unionism (*see* JA 118), it has intervened in the *Pichler* litigation to request a court order granting it access to confidential motor vehicle information that may not even reflect DPPA violations in order that it might notify the persons whose names are in the records that their rights under the DPPA may have been violated. A court's providing NRTW access to the West Records "pursuant to an order of . . . court" merely because the court approved NRTW's proposed use of the records would usurp Congress's authority to decide when motor vehicle information may be provided and would require courts to serve as the gatekeepers of access to confidential motor vehicle information by deciding on a case-by-case basis which requests are deemed acceptable.[4]

Moreover, it is not clear that a federal court would have jurisdiction to enter such an order. Although

[4] The principle relied on in *Dalia v. United States*, 441 U.S. 238 (1979), the only case cited by NRTW in their Petition, that the Court should not interpret a statute to be self-defeating, is in no way inconsistent with this analysis.

NRTW intervened in the *Pichler* action with the announced purpose of modifying the Protective Order, the thrust of its motion – as demonstrated by its proposed letter – was to obtain the District Court's permission to send the proposed letter notice to individuals not before the court and not related to any case or controversy before the court:

- NRTW is a legal aid foundation which neither itself has been injured by UNITE's alleged violations of the DPPA nor does it have members who were so injured (*see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (holding that Article III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision));

- The persons to whom NRTW seeks to send notice are not members of the *Pichler* class and their only relationship to the dispute before the court is that they allegedly may have had their rights violated in the same way as parties before the *Pichler* court; and

- There are no claims pending before the *Pichler* court by or on behalf of any person to whom the notice would be sent, other than a request for authority to disseminate information about potential claims that courts are not in the business of providing.

Because neither NRTW nor the individuals to whom the notice would be sent have suffered any injury as a result of UNITE's conduct vis-à-vis the Cintas employees that gives rise to the *Pichler* litigation, there is not an Article III case or controversy in which the *Pichler* court might grant NRTW permission to send the proposed letter. *See, e.g., Pennsylvania Prison Soc'y v. Cortes*, 508 F.3d 156, 162-63 (3d Cir. 2007) (relying on *Sierra Club v. Morton*, 405 U.S. 727 (1972), to hold that there is no case or controversy when an organizational plaintiff seeks judicial relief neither for an injury to itself nor to any of its individual members).

In sum, contrary to the Petitioner's argument, the Third Circuit's interpretation of the DPPA was not "self-defeating"; rather, it correctly limited the disclosure of motor vehicle record information without in any way limiting the DPPA's enforcement.

B. THE THIRD CIRCUIT'S OPINION IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS WHICH HAVE REFUSED TO ALLOW ACCESS TO MOTOR VEHICLE RECORD INFORMATION UNLESS THE INFORMATION WOULD BE USED FOR ONE OF THE FOURTEEN PERMITTED USES ENUMERATED IN THE DPPA

Misrepresenting the holding of the Third Circuit, NRTW argues that "the [Third Circuit] held that the DPPA prohibits the disclosure of evidence of DPPA violations to notify the victims of those violations, even pursuant to court orders." (Pet. at 6.) Rather, the Third Circuit held that NRTW was not entitled to a court order because its request did not come within any of the fourteen explicit exceptions provided by the DPPA. The Third Circuit's focus on whether NRTW's request fell within one of the fourteen explicit exceptions is consistent with the way that *every* other court has analyzed this issue. Although most DPPA cases arise in the context of alleged DPPA violations, there are a few cases addressing a plaintiff's request for a court order allowing access to motor vehicle records. In each of those cases, the court to which the request was addressed has analyzed whether that request came within one of the permitted uses enumerated in the DPPA.

For example, in *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. 2005), a lawyer submitted a request pursuant to the District of Columbia's analogue to the Freedom of Information Act for the names and addresses of motorists who had improperly received traffic citations at a certain intersection because of a

malfunctioning traffic camera. The lawyer sought these names and addresses to enable him to solicit people to join a class action that he had filed on behalf of motorists who had received improper traffic citations. The *Wemhoff* court found that such solicitation did not come within the Litigation Exception to the DPPA, holding that "acquiring personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." *Id.* at 1012.

Similarly, in *Hartman v. Dep't of Conservation & Natural Resources*, 892 A.2d 897 (Pa. Commw. 2006), a publisher attempted to obtain the names and addresses of snowmobile owners pursuant to Pennsylvania's Right-to-Know law in order to mail them a publication. The court denied this request because it did not find that the publisher's inclusion of safety information in one edition of a magazine transformed a commercial use into a "use in connection with matters of motor vehicle or driver safety" pursuant to 18 U.S.C. § 2721(b)(2). *Id.* at 905.

Further, *Locate.Plus.Com, Inc. v. Iowa Dep't of Transp.*, 650 N.W.2d 609 (Iowa 2002), concerned an action brought by Worldwide Information, Inc., a corporation which sells motor vehicle information to law enforcement agencies, against the Iowa Department of Transportation for its refusal to provide motor vehicle records. The Iowa Supreme Court affirmed the district court's determination that Worldwide Information was not entitled to the motor vehicle records because its proposed use of the motor vehicle information did not fall within any of the enumerated exceptions. *Id.* at 618

(noting that "Congress provided a long list of uses but failed to include the use engaged in by Worldwide. Generally, the express mention of one thing in a statute implies the exclusion of others. Thus, when a legislative body delineates exceptions, it is presumed that no others were created or intended." (citations omitted)).

These courts' analysis is consistent with the Third Circuit's analysis here. In each instance, the court's decision whether or not to issue an order was based on whether the request for motor vehicle records fit within one of the fourteen exceptions. If NRTW's interpretation were correct, this analysis would have been unnecessary as in each case the records could have been provided pursuant to a court order. Therefore, these decisions demonstrate that in ruling upon a request for access to motor vehicle record information, a court may issue an order allowing access only when it finds that the movant seeks the information for one of the fourteen permissible uses set forth in Section 2721(b). Because there is no decision in which a court has issued an order allowing access to motor vehicle records in the absence of evidence of one of the permitted uses enumerated in the DPPA, the Court should decline this petition.

C. THE DISTRICT COURT'S ALTERNATIVE HOLDING THAT THE PROTECTIVE ORDER SHOULD NOT BE MODIFIED MAKES THIS CASE AN INAPPROPRIATE VEHICLE FOR INTERPRETING THE DPPA

NRTW requests that this Court grant its petition for certiorari to reverse the Third Circuit's decision, which held that NRTW lacked standing to modify the Protective Order. However, even if this Court reversed the Third Circuit and found that NRTW had standing, NRTW would not obtain access to the West Records that it seeks. The District Court not only found that NRTW lacked standing, but also, addressing the merits of NRTW's motion, held that the Protective Order should not be modified. (Pet.App. 28a-30a.) The District Court considered the factors governing the modification of a protective order in the Third Circuit, as set forth in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-88 (3d Cir. 1994), and found that when these factors are weighed, "the balance tips in favor of UNITE." (Pet.App. 30a.) Specifically, the District Court found that (1) the West Records would reveal UNITE's organizing strategy, (2) UNITE relied on the protective order, and "had we not granted UNITE's application [for a protective order], it might have legitimately limited the Westlaw searches that it produced in discovery to those involving Cintas employees," (3) the information in the West Records was an inaccurate record of individuals whose motor vehicle information was obtained by UNITE in that it was "both over- and under-inclusive,"[6]

[6] As discussed *supra*, the West Records are a recreation of searches originally run by UNITE that was performed years

(Cont'd)

and (4) the continued protection of the West Records should not prevent NRTW from finding claimants. (Pet.App. 28a-30a.) On appeal, the Third Circuit did not reach the merits of NRTW's motion, stating that "[b]ecause we agree that the NRTW lacks standing, that ends our inquiry, we need not consider the district court's alternative holding that modification of the protective order is inappropriate on the merits." (Pet.App. 15a.)

Even if NRTW were correct that the District Court *could* issue an order modifying the Protective Order to provide NRTW with the West Records, the District Court has already held that it would not do so. Therefore, NRTW's argument here – that a court may issue an order providing motor vehicle records even if the request does not fall within any of the fourteen permitted uses – is merely academic; the District Court has already held that it would not exercise its discretion to issue such an order. Because resolution of the statutory interpretation question presented by NRTW would not resolve its entitlement to the discovery materials, and because the District Court's denial of the requested modification of the Protective Order could be reversed only upon a demonstration that the District Court abused its discretion, this petition is not the appropriate vehicle for this Court to undertake an explication of the "pursuant to an order of . . . court" provision in the Litigation Exception to the DPPA.

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later by West. Therefore, the West Records necessarily include individuals whose information was not obtained by UNITE and fail to include individuals whose information was obtained by UNITE.

CONCLUSION

For the foregoing reasons, UNITE respectfully urges the Court to deny this petition for a writ of certiorari.

Respectfully submitted,

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